Supreme Court of the United States

OCTOBER TERM, 1951.

No. 25.

SUTPHEN ESTATES, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA, LOEW'S INCORPORATED, WARNER BROS. PICTURES, INC., *ET AL.*,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

PETITION FOR REHEARING.

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ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

PETITION FOR REHEARING.

Appellant respectfully prays for a rehearing of this appeal or a reconsideration by this Court of its decision announced November 5, 1951.*

In its opinion this Court holds that although this is a case of "a distribution or other disposition of property which is in the custody or subject to the control or disposi-

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* By an order dated November 20, 1951 and signed by the Chief Justice time to file this petition was extended to and including November 30, 1951.

tion of the court * * *'' within the meaning of Rule 24(a)(3), nevertheless Appellant may not be permitted to intervene because it has not shown that ''it will be 'adversely affected' by the reorganization.'' Evidently the Court has acted under a misconception as to the record. Appellant's burden was to show that it was adversely affected by the Consent Judgment and not by a plan of reorganization which never has been and is not now before the court.

Our moving papers disclosed that under the proposed Consent Judgment, then about to be entered, the assets of the Warner enterprises were to be dispersed, and Warner, the corporate guarantor on Appellant's lease, was to be dissolved (R. 34, par. 3; R. 38-39, par. 8). These facts were not disputed and indeed could not be disputed. Furthermore, these are the only record facts relevant to the issue presently before this Court.

The adverse effect of such Consent Judgment upon Appellant's guaranty is self-evident and devastating beyond dispute.

The holding here is not that Appellant has failed to show that it will be adversely affected by the Consent Judgment but that it has failed to show that it will be adversely affected by ''the reorganization''; and particularly in that it has failed to show any inadequacy of ''the guaranty of the new theatre company''.

This ruling could have resulted only from the assumption that ''the plan of reorganization'' was before the court below and constitutes a part of the record in this Court. It was not and is not.

Appellant's motion was denied from the bench at the hearing on January 4, 1951 and the Consent Judgment was entered on the same day (R. 31-2; 8-30).

The Consent Judgment provided that within ninety days thereafter Warner should present to its stockholders a plan of reorganization to effect a divorcement of its theatre assets from its production and distribution assets; that said plan should provide for a distribution of such assets and for the dissolution of Warner (R. 25, par. VI, A). It was not required or intended that such plan of reorganization should be submitted to or be passed upon by the court.

Following the Consent Judgment a proxy statement thereafter prepared and dated January 11, 1951, was sent out to the Warner stockholders containing a plan of reorganization. A meeting of stockholders of Warner was held on February 20, 1951 and the plan was approved (R. 224-5).

Appellant could not be called upon to show that it was adversely affected by matters which not only were not of record, but which had not even come into being. Thus the holding here rests upon assumptions of fact entirely *de hors* the record.

This Court may have been misled into assuming that the plan of reorganization had been passed upon by the court below and was part of the record here, by reason of the fact that at the request of the Solicitor General copies of the proxy statement were distributed to the members of this Court with the record and briefs on the argument of the appeal. Certainly, however, it could not have been intended to incorporate in the record a plan of reorganiza-

tion which was not submitted to the court below, was not promulgated until after the hearing on Appellant's motion, and was not in existence at the date of the hearing. (It was indicated on the hearing that a proxy statement was to be or was being prepared. R. 218, ff. 208-22; R. 219, ff. 208-23).

Surely the adverse effect of a plan which came into existence after the entry of the judgment appealed from could not have been litigated in the court below and cannot be litigated *ab initio* in this Court.

At no time has Appellant had an opportunity to show that it would be adversely affected by the plan of reorganization or that the suggested guaranty by a new theatre company is inadequate.

When Appellant had its day in court the plan of reorganization was nonexistent and there was no provision (and there still is none) anywhere for a new guaranty by anybody. There was nothing before the Court but the proposed Consent Judgment.

When Appellant had its day in court it was limited on the record to showing that it would be "adversely affected" by the proposed Consent Judgment; and that it did.

Since Appellant would be adversely affected by the proposed Consent Judgment it was entitled as a matter of right to intervene and have a judicial ascertainment of an equivalent substitute for the guaranty which was about to be destroyed. It is now denied that right upon the ground that it has failed to show that it was adversely affected by a subsequently adopted plan of reorganization, not of record.

Appellant submits that it is entitled to intervene and to have a determination of the issues to be joined on its pleading in intervention.

WHEREFORE Appellant prays that this Court reconsider this appeal and reverse the order denying Appellant's motion to intervene.

Respectfully submitted,

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I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

H. G. PICKERING,
Counsel for Appellant.